Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

SUPREME COURT
OF THE
UNITED STATES
OCTOBER TERM, 1977

NO. 77-1860

DAVID WAYNE RANKIN,

Petitioner,

VS.

THE UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES
October Term 1978
No. .....

DAVID WAYNE RANKIN,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FIFTH CIRCUIT

To the Honorable WARREN E. BURGER, Chief Justice of the United States of America, and to the Honorable Associate Justices of the United States Supreme Court:

Comes now DAVID WAYNE RANKIN, Petitioner, by his attorney, Roger S. Hanson, Esq. of Santa Ana, California, a member of the Bar of the United States Supreme Court, and Ray Gene Smith, Esq., petitioning this Honorable Court for a Writ of Certiorari directed to the United States Court of Appeals, Fifth Circuit at New Orleans, Louisiana, to review constitutional errors occurring in his trial of prossession of marijuana with intent to distribute conducted in the United States District Court for the Southern District of Texas in Corpus Christi, Texas.

Pursuant to Rule 23, Rules of the Supreme Court of the United States, petitioner submits the following:

(a)

OPINION BELOW

The United States Court of Appeals, Fifth Circuit rendered opinion on May 4, 1978, a copy of which is attached to this petition as Exhibit "A". Judgment was rendered on May 4, 1978, a copy of which is attached to this petition as Exhibit "B".

A Petition for Rehearing was made and was denied on or about May 30, 1978. A copy of the Order denying same is herewith attached as Exhibit "C".

(b)

The grounds upon which the jurisdiction of this Honorable Court is invoked are:

(i) the date that the judgement which is sought to be reviewed was entered is May 4, 1978;

(ii) a petition for rehearing was made and denied on May 30, 1978, by the United States Court of Appeals, Fifth Circuit.

(iii) the statutory provision conferring jurisdiction on this Honorable Court is 28 U.S.C 1254(1). The other grounds upon which jurisdiction of this Court is invoked involves the violation of certain constitutional amendments, namely the Fourth Amendment, the Sixth Amendment, the Fourteenth Amendment and the Fifth Amendment to the Constitution of the United States. The Honorable Robert Ainsworth, Circuit Justice for the Fifth Circuit granted time up to and including 29 June, 1978 to file this Petition.

(c)

UNITED STATES
CONSTITUTIONAL AMENDMENTS INVOLVED

Fourth Amendment:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger nor shall any person be subject for the same offence to

be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Sixth Amendment:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by laws, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

Fourteenth Amendment, Section One:

"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(d)

CONSTITUTIONAL ISSUES PRESENTED

1. Whether the trial court's admission over objection of trial counsel of hearsay statements by a federal agent of an extorted oral confession made by another defendant not charged with same factual offense and not in the same trial, and conspiracy was not charged, violated petitioner's Sixth Amendment rights under **Bruton vs. United States 391 U.S. 123.** Also, the confession of the other defendant does not say that your petitioner knew what was in the trunk.
2. Whether the trial court's refusal to let defense counsel examine the jury and the trial court's refusal to ask any of the

questions requested by defense counsel in selecting the jury is a denial of the Sixth Amendment and the Fourteenth Amendment, that is denial of Counsel and due process and an impartial jury of the State and district wherein the crime shall have been committed.
3. Whether the trial court erred in refusing to allow cross-examination of Federal agent for motive of bias.
4. Whether the petitioner's Fourth Amendment rights were violated when a search is conducted about seventy (70) miles from any border and claimed to be a permanent checkpoint which checkpoint is not used all the time, and the "permanent checkpoint" is a vehicle.
5. Whether the Court erred in its opinion affirming the Judgment of Conviction, by not properly applying the well established rule of **Miranda v. Arizona**, 384 U.S. 436, and in it's judicial interpretations requiring careful scrutiny of the government's actions where the accused in a companion case has asserted his right to an attorney, but was still questioned by agents and threatened with a federal charge of assault on a Federal Agent and bond set at $25,000.00 cash or surety on said charge, which was, on preliminary hearing dismissed, ruled by the court to be a voluntary statement, when, in fact, federal agents attacked the man for his car keys, wrestled him to the ground and handcuffed him for forty-five minutes in such a manner that he was begging them to loosen the cuffs, and then to use that "voluntary statment" of a defendant in a companion case against petitioner, which surely violated the spirit of **Miranda**.
6. Whether olfactory identification of marijuana by a border patrol agent at a permanent checkpoint, standing alone, gives rise to probable cause to search the trunk of petitioner's automobile.
7. Whether the Court erred in upholding the trial court's overruling of the Motion to Suppress the using of the confession of Doyle Kent Ogden.

(e)

STATEMENT OF FACTS IN SUPPORT OF GRANT OF CERTIORARI

On March 9, 1976, at approximately 6:00 a.m., a David Wayne Rankin was stopped at a Border Patrol Checkpoint located at a point seven miles south of Falfurrias, Texas on U.S. 281. As he talked with Rankin concerning Rankin's citizenship, Gordon Reed, a Border Patrol Agent said he smelled the odor of marijuana and observed Rankin's vehicle to be riding low, that it had no license plate on the front, and that it bore a Fort Sill sticker. Agent Reed testified that he obtained the keys from Rankin and discovered marijuana bricks in the trunk.

On the same date at approximately 6:25 a.m., at the same checkpoint, Agent Reed also stopped Doyle Kent Ogden and noticed that Odgen's vehicle had no license plate in front, had a Fort Sill sticker, had in it a can of Glade air-freshener, and detected an odor of marijuana. Agent Reed told Ogden he smelled marijuana, then asked Ogden to open the trunk. Ogden stated that Reed would need a search warrant, wanted a lawyer, or a lawyer present while the trunk was being opened. Agent, Reed, with considerable help, forcibly took the keys from Ogden, opened the trunk and discovered marijuana bricks.

Louis W. Dracoulis, Special Agent for the Drug Enforcement Administration testified at Ogden's trial that, after **Miranda** warnings were given, Ogden stated that he was the main trucker for the people in Oklahoma, that he had made eight to ten trips for the delivery of marijuana, that he was being paid $8,000.00 for this load, and that he was paying Rankin $1,000.00 to deliver part of the load. D.E.A. Agent Eakes, at Rankin's trial testified that, Rankin told him that he was being paid a thousand dollars by Mr. Ogden to drive the car to Oklahoma.

(f)

ARGUMENT

I

The Court of Appeals for the Fifth Circuit erred in holding that olfactory identification of marijuana by a border patrol agent at a permanent checkpoint, standing alone, gives rise to probable cause to search the trunk of petitioner's automobile.

II

The Court of Appeals erred in holding that the trial court could limit the scope of petitioner's cross-examination of a key government witness where petitioner sought to establish motive or animus.

III

The Court of Appeals erred in holding that the trial court could allow a confession, related by an agent, extorted from Doyle Kent Ogden, to be used in another case against David Wayne Rankin, your petitioner, when conspiracy is not charged against David Wayne Rankin, and neither Doyle Kent Ogden or David Wayne Rankin took the stand to testify.

The Court of Appeals erred in holding that the trial court could deny the confrontation clause - the Sixth Amendment of the Constitution of the United States - in violation of the Sixth Amendment of the Constitution of the United States, when the confession of another person is allowed, therefore also denying due process in violation of the Fourteenth (14th) and Fifth (5th) Amendments of the Constitution of the United States along with denying the right to confront the witness, as this case does not contain evidence of the guilt of petitioner Rankin absent the hearsay declarations.

The Court of Appeals erred in upholding the trial court's overruling of the Motion to Suppress the using of the confession of Doyle Kent Ogden.

Dutton v. Evans, 400 U.S. 74; **Bruton v. U.S.,** 391 U.S. 123; **U.S. v. Adams,** 446 F.2d 681 (9th Cir. 1971).

This court in **Bruton v. U.S.,** 391 U.S. 123 was ruling on the exclusion of co-defendant's confession which implicated ac-

cused and although in this case there was a separate trial, the oral confession of a defendant - a companion case - was used on the very issue of knowledge of this petitioner as to contraband and although in **Jackson v. Deno,** 378 U.S. 395, there are some contexts in which the jury cannot or will not follow instructions is so great and the consequences of failure so vital to the defendant that the practical and human limitations of the jury system cannot be ignored. And since Brunston was given rectroactive application to correct a serious flaw in the fact finding process at the trial and it is impossible to cross-examine a federal agent's hearsay statement of an oral confession, not recorded, not reduced to writing, makes such hearsay deadly poison to the defendant in violation of the Sixth Amendment of the Constitution of the United States. This graphically shown by an eleven month memory of Agent Eakes, who one day before trial in this case suddenly remembered that this Petitioner had made a confession also. On a hearing to exclude such confession, the trial court ruled that he had been given a warning, although no statement was reduced to writing, but the eleven month memory occurred and although Agent Eakes ultimately did not testify to what he had said in the evidenciary hearing before the court, he nevertheless coupled with the confession of Doyle Kent Ogden, a companion case, collaborated with the confession part of the statement given by confessing companion.

In addition, the companion confession used against petitioner came after a request for an attorney, an attack by the agents, and threats carried out, torture to the point of the man begging them to take off the handcuffs. Because of the anger of the agents and the circumstances in totality, this court should make a new rule that all alleged confessions taken by federal agents be tape-recorded and reduced to writing. It is, in view of the enormous number of misdeeds by police, by agents of different organizations, to allow unbridled statements for agents of what somebody orally is supposed to have said.

IV

The Court of Appeals erred in holding that the trial court was correct in allowing the confession of Doyle Kent Ogden to be used against Defendant David Rankin and in holding that the trial court was correct in ruling that the confession of Doyle Kent Ogden was not extorted from Doyle Kent Ogden, in that whether the confession is found to be extorted or not should not affect the admissibility of the confession and make it useable against Defendant David Rankin in violation of the Sixth Amendment of the Constitution of the United States. **Dutton v. Evans,** 400 U.S. 74; **Bruton v. U.S.,** 391 U.S. 123; **U.S. v. Adams,** 446 F.2d 681 (9th Cir. 1971).

V

The Court of Appeals erred in upholding the trial court's overruling defendant's objection that the jury selection was improper, when, in fact, it denies the defendant the assistance of counsel in violation of the Sixth Amendment of the Constitution of the United States.

CONCLUSION

For each and every one of the serious foregoing constitutional issues, this Honorable Court should grant a hearing in federal courts.

DATED this 28th day of June, 1978, at Wichita Falls, Texas.

Respectfully submitted,

ROGER S. HANSON, ESQ.

RAY GENE SMITH, ESQ.

by ROGER S. HANSON,
Member of the Bar,
United States Supreme Court

Attorneys for Petitioner

EXHIBIT A

DAVID WAYNE RANKIN, Defendant-Appellant
No. 77-5253 United States Court of Appeals, Fifth Circuit
UNITED STATES OF AMERICA, Plaintiff-Appellee
May 4, 1978

OPINION

Defendant was convicted before the United States District Court of the Southern District of Texas, Owen D. Cox, J., of possession of marijuana with intent to distribute, and he appealed. The Court of Appeals held that: (1) seven-month delay between arraignment and trial did not require dismissal of indictment on speedy trial grounds where there was a satisfactory explanation for most of the delay, no prejudice was claimed and defendant did not assert his right to speedy trial until date of trial; (2) where border patrol agent who stopped defendant at permanent checkpoint detected odor of marijuana as he spoke with defendant regarding the latter's citizenship, agent had probable cause to search trunk of defendant's automobile, which he noted to be riding low; (3) refusal to allow cross-examination of the border patrol agent regarding his knowledge of legal standards concerning border stops and searches was not abuse of discretion, and (4) it was not error to admit evidence of search and arrest of another individual who, some 25 minutes after defendant's arrest, was found to be transporting marijuana under almost identical circumstances as was defendant.

Affirmed.

1. Criminal Law - 576(5, 8)

Delay of 220 days from arraignment to trial did not require dismissal of indictment where part of delay was attributable to defendant's waiver of speedy trial pending outcome of pending crucial decision, notwithstanding that the Government should have discovered that the case had already been decided, no prejudice was claimed to have resulted from the delay and defendant did not assert his right to a speedy trial and there was a satisfactory explanation for most of the delay.

2. Criminal Law - 573

A seven-month delay between arraignment and trial is not presumptively prejudicial for speedy trial purposes.

3. Criminal Law - 273.1(2)

There is no constitutional right to plea bargain.

4. Jury - 131(10)

It is for the trial court's discretion to conduct examination of prospective jurors itself or permit counsel to undertake the examination. Fed. Rules Crim. Proc. rule 24(a), 18 U.S.C.A.

5. Customs Duties - 126

Where defendant's vehicle had an Oklahoma license plate on the rear, no license plate in front and a Fort Sill sticker and border patrol agent at permanent checkpoint located seven miles south of Falfurrias, Texas, observed that the vehicle was riding low and as agent spoke with defendant regarding his citizenship the agent detected odor of marijuana, the agent had probable cause to search the trunk. Comprehensive Drug Abuse Prevention and Control Act of 1970, Sec. 401(a)(1), 21 U.S.C.A. Sec. 841(a)(1).

6. Witnesses - 267

Broad discretion is vested in the trial court in regard to limiting scope of cross-examination.

7. Witnesses - 270(2)

Refusal to allow defendant to cross-examine border patrol agent regarding agent's knowledge of legal standards concerning border stops and searches was not abuse of discretion since agents knowledge of the appropriate legal standards was not relevant to constitutionality of the stop, which occurred at permanent border patrol checkpoint.

8. Drugs and Narcotics - 108

Evidence of search and arrest of individual who within 25 minutes after defendant's arrest at permanent border checkpoint for transporting marijuana was discovered transporting marijuana under almost identical circumstances was relevant to defendant's knowledge that his trunk contained contraband and also helped to explain context of defendant's post-arrest admission that the other was paying $1,000.00 to make the delivery. Comprehensive Drug Abuse Prevention and Control Act of 1970, Sec. 401(a)(1), 21 U.S.C.A. Sec. 841(b), 28 U.S.C.A.

Appeal from the United States District Court for the Southern District of Texas.

Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

PER CURIAM:

David Wayne Rankin appeals from his conviction of possession of marijuana with intent to distribute, in violation of 21 U.S.C. Sec. 841(a)(1). We affirm.

Defendant Rankin and Doyle Kent Ogden, the defendant in a companion case, were arrested at the permanent checkpoint seven miles south of Falfurrias, Texas, on March 9, 1976. The first car to be stopped was driven by defendant Rankin. The vehicle had an Oklahoma license plate on the rear, no license plate in front, and a Fort Sill sticker. The Border Patrol agent observed that the vehicle was riding low. As Agent Reed spoke with defendant Rankin regarding his citizenship, he detected the odor of marijuana. The agent then asked defendant to open the trunk, defendant complied, and the agent discovered bricks of marijuana. Twenty-five minutes later a second vehicle, also bearing an Oklahoma license plate in the rear but not in the front, and a Fort Sill sticker, was stopped at the checkpoint. Once again, the odor of marijuana was detected, the trunk searched, marijuana found, and the driver, Doyle Kent Ogden, taken into custody. Agent Eakes testified that after defendant Rankin and Doyle Ogden were properly given the **Miranda** warnings, both defendant and Ogden admitted that Ogden was paying Rankin $1,000.00 to drive the vehicle to Oklahoma.

(1, 2) Defendant's first contention is that he was denied a speedy trial because of undue delay between arraignment and trial. Arraignment was conducted on June 28, 1976. Defendant waived speedy trial on August 11, 1976, in order to wait for the Supreme Court's decision in **United States v. Sifuentes,** which the Government viewed as crucial in this case. The waiver expressly stated that the pendency of the **Sifuentes** decision was the reason for the continuance, that defendant's case would be called at a docket call after **Sifuentes** was decided, and that the jury selection would commence within sixty days after the docket call. It was later discovered that at the time the waiver was executed **Sifuentes** had already been decided (under the title of **United States v. Martinez-Fuerte,** 428 U.S. 543, 96 S. Ct. 3074, 49 L.Ed.2d 1116 (1976)). October 18, 1976 was sent as the date for jury selection, but this was reset for October 28 because of a death in defense counsel's

family. On October 28, jury selection was reset once again for November 23. The jury was selected on November 24, and trial set for January 20, 1977, but later rescheduled for February 3, 1977.

Thus, there was a delay of 220 days from arraignment to trial. Some of this delay is plainly attributed to defendant's waiver of speedy trial pending the outcome of **Sifuentes.** Although the Government should have discovered that **Sifuentes** had already been decided, defense counsel was also to blame. In any case, no prejudice has been claimed to have resulted from the seven-month delay here. In addition, defendant did not assert his right to a speedy trial until the date of trial. A seven-month delay is not presumptively prejudicial, and there is a satisfactory explanation for most of the 220-day period between arraignment and trial. In light of these facts, dismissal was not required. See **Barker v. Wingo,** 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101 (1972); **United States v. Kilrain,** 5 Cir., 1978, 566 F.2d 979, 984; **United States v. Garcia,** 5 Cir., 1977 553 F.2d 432.

(3, 5) The second claim advanced by defendant is that dismissal of the indictment is required because the trial court did not allow plea bargaining. The record indicates that it was prosecutorial policy to refuse to plea bargain in single indictment cases, and that the prosecution viewed plea bargaining as inappropriate in this cause because of the large amount of contraband involved. As there is no constitutional right to plea bargain, see **Weatherford v. Bursey,** 429 U.S. 545, 561, 97 S.Ct. 837, 846, 51 L.Ed.2d 30 (1977), we reject defendant's claim. In addition, defendant argues that he was prejudiced by the trial court's refusal to allow defense counsel to ask questions of prospective jurors on voir dire, and instead permitted counsel to submit written questions to the court, which conducted the actual questioning. Under Rule 24(a) of the Federal Rules of Criminal Procedure the court may permit counsel to conduct the examination of prospective jurors, or to conduct the examination itself. Thus, it is within the trial court's discretion to conduct the examination. See **United States v. Wertis,** 5 Cir., 1974, 505 F.2d 683, **cert. denied,** 422 U.S. 1045, 95 S.Ct. 2662, 45 L.Ed.2d 697 (1975). The trial court also was correct in denying defendant's motion to suppress the evidence obtained from the search of the automobile trunk. The initial stop was

justified because this checkpoint is permanent, and the subsequent olfactory identification of the marijuana gave the agent probable cause to search the trunk. See e.g., **United State v. Vale,** 5 Cir., 1977, 558 F2d. 237.

(6, 7) The fifth contention urged by defendant is that the trial court erred in limiting the cross-examination of the Border Patrol agent who stopped defendant at the Falfurrias checkpoint. The trial court refused to allow cross-examination of the agent regarding his knowledge of the legal standards concerning border stops and searches set forth in **Almeida-Sanchez v. United States,** 413 U.S. 266, 93 S.C.t. 2535, 37 L.Ed.2d 596 (1973). Board discretion is vested in the trial court in regard to limiting the scope of cross-examination. See e.g., **United States v. Zepeda-Santana,** 5 Cir., 1978, 569 F2d 1386 (1978). We find no abuse of discretion in this case, as the agent's knowledge of the appropriate legal standards is not relevant to the constitutionality of the stop.

(8) Finally, defendant insists that it was error to admit evidence of the search and arrest of Doyle Ogden because this evidence constituted proof of an extraneous offense. There was no error, because this evidence did not fall within the proscriptions of Fed. R. Evid. 404(b), as it did not indicate or even suggest that Defendant Rankin had a criminal character. The fact that Ogden was transporting marijuana under almost identical circumstance as Rankin was certainly relevant to the issue of defendant's post-arrest admission that Ogden was paying him $1,000 to make the delivery. The relevance of this evidence was relatively high and the potential for prejudice was low.

AFFIRMED.

EXHIBIT B

For The Fifth Circuit

No. 77-5253
Summary Calendar

D. C. Docket No. CR-76-C-198

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

DAVID WAYNE RANKIN,

Defendant-Appellant,

Appeal from the United States District Court for the
Southern District of Texas
Before GOLDBERG, AINSWORTH and HILL, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

May 4, 1978

ISSUED AS MANDATE:

EXHIBIT C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCIUT

NO. 77-5253

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VS.

DAVID WAYNE RANKIN,

Defendant-Appellant

Appeal from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING
(May 30, 1978)

Before GOLDBERG, AINSWORTH, and HILL, Circuit Judges.
PER CURIAM:
IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED

ENTERED FOR THE COURT:

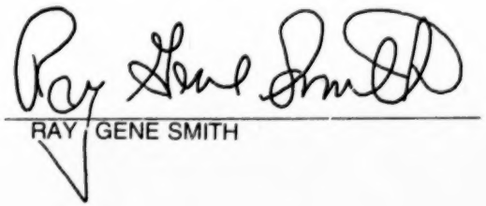
United States Circuit Judge, Robert Ainsworth

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of June, 1978, I served the within PETITION FOR WRIT OF CERTIORARI on the interested parties in said action, by placing three true and correct copies in each of two sealed envelopes, with postage thereon fully prepaid, in the United States mail at Wichita Falls, Texas addressed as follows:

Solicitor General
Department of Justice
Washington, D. C. 20530

I CERTIFY under penalty of perjury that the foregoing is true and correct.
EXECUTED ON June 29th, 1978 at Wichita Falls, Texas.



RAY GENE SMITH

Supreme Court, U. S.
FILED
OCT 28 1978
MICHAEL RODAK, JR., CLERK

Nos. 77-1860 and 77-1861

In the Supreme Court of the United States

OCTOBER TERM, 1978

DAVID WAYNE RANKIN, PETITIONER

v.

UNITED STATES OF AMERICA

DOYLE KENT OGDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General

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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1860

DAVID WAYNE RANKIN, PETITIONER

v.

UNITED STATES OF AMERICA

No.77-1861

DOYLE KENT OGDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals in No. 77-1860 (Pet. App. 10-14) is reported at 572 F.2d 503. The

opinion of the court of appeals in No. 77-1861 (Pet. App. 10-12) is reported at 572 F.2d 501.

JURISDICTION

The judgments of the court of appeals were entered on May 4, 1978. Petitions for rehearing were denied on May 30, 1978. The petitions for a writ of certiorari were filed on June 29, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether probable cause existed to search petitioners' cars at a permanent border patrol checkpoint.
2. Whether the district court impermissibly restricted petitioners' cross-examination of government witnesses.
3. Whether the district court erred in refusing to permit petitioners' counsel to conduct the voir dire of prospective jurors.
4. Whether a statement by petitioner Ogden was improperly admitted against petitioner Rankin.
5. Whether petitioner Ogden's confession was properly introduced at this trial.

STATEMENT

Following separate jury trials in the United States District Court for the Southern District of Texas, petitioners were convicted of possession of marijuana with intent to distribute in violation of 21 U.S.C.

841(a)(1). Petitioner Rankin was sentenced to three years' imprisonment to be followed by a special parole term of four years. The court of appeals affirmed (77-1860 Pet. App. 10-14). Petitioner Ogden was sentenced to four years' imprisonment to be followed by a special parole term of five years. The court of appeals affirmed (77-1861 Pet. App. 10-12).[1]

The evidence at the trials showed that at 6:00 a.m. on March 9, 1976, petitioner Rankin, driving a Buick with an Oklahoma license plate and a Fort Sill, Oklahoma, sticker, was stopped at a permanent border patrol checkpoint seven miles south of Falfurrias, Texas. As border patrol agent Gordon Reed was questioning Rankin about his citizenship, he detected the odor of marijuana. The agent asked Rankin to open the trunk and Rankin did so. Inside the trunk the agent found some 500 pounds of marijuana bricks. Petitioner was placed under arrest and given *Miranda* warnings (R. Tr. 35-41, 67, 100-101, 215; O. Tr. 12-16).[2]

Twenty-five minutes later petitioner Ogden drove up in a Chevrolet and stopped at the checkpoint. This car also bore an Oklahoma license plate and a Fort Sill sticker (O. Tr. 17-18; R. Tr. 43, 47, 50).

---

[1] Although petitioners were tried separately and their appeals were separately considered, we have consolidated our response to their petitions because most of the same facts are involved in each case and because petitioners raise some of the same issues.

[2] "R. Tr." refers to the transcript of petitioner Rankin's trial; "O. Tr." refers to the transcript of petitioner Ogden's trial.

As Agent Reed was questioning Ogden about his citizenship, he saw a can of air freshener on the front seat and detected the odor of marijuana (O. Tr. 17-18, 20). Reed then asked Ogden to open his trunk (O. Tr. 18, 27-28, 30). Ogden got out of his car and stated that the agent should obtain a search warrant and that Ogden wanted a lawyer present before his trunk was opened (O. Tr. 19). When Ogden refused to open the trunk or surrender the keys, Reed and another agent forcibly took the keys from him and opened the trunk (O. Tr. 26, 31-32). Inside the trunk the agents found bricks of marijuana weighing 365 pounds, similar to those earlier discovered in Rankin's car (O. Tr. 20, 110). Ogden was arrested and immediately given *Miranda* warnings, and he indicated that he understood his rights (O. Tr. 20-22).

Shortly thereafter DEA agents arrived to take petitioners to the DEA regional office in Corpus Christi, Texas. The agents advised petitioners that they were under arrest for possession of marijuana with intent to distribute and again advised them of their *Miranda* rights (R. Tr. 94-95; O. Tr. 63, 100, 107, 115). Petitioners both replied that they understood their rights (R. Tr. 95; O. Tr. 63). During the trip to Corpus Christi, Ogden told Agent Louis Dracoulis that he was working for some people out of Oklahoma City and had made approximately eight trips to the "valley" to pick up marijuana as their "number one trucker". He stated that he was to be paid $8,000 for transporting the load of marijuana in his car and that he was paying Rankin $1,000 to

help him drive the marijuana back to Oklahoma City (O. Tr. 106-107).

Upon arrival at the Corpus Christi office, Ogden made a similar confession to DEA Agent John Eakes (O. Tr. 109-116). At Corpus Christi, Rankin also admitted to Eakes that Ogden had agreed to pay him $1,000 to transport the marijuana to Oklahoma (R. Tr. 113, 114, 155).

ARGUMENT

1. Petitioners' contention (77-1860 Pet. 6; 77-1861 Pet. 6) that "olfactory identification of marijuana by a border patrol agent at a permanent checkpoint" is insufficient to establish probable cause to search the trunk of an automobile, is contrary to numerous decisions on the question. See, *e.g.*, *United States* v. *Gutierrez*, 560 F.2d 195 (5th Cir. 1977); *United States* v. *Vale*, 558 F.2d 237 (5th Cir. 1977); *United States* v. *Torres*, 537 F.2d 1299 (5th Cir. 1976); cf. *United States* v. *Chadwick*, 433 U.S. 1, 13 (1977).[3] Petitioners cite no decisions in support of their contention, and we are aware of none. The contention does not merit review by this Court.

2. Petitioners allege (77-1860 Pet. 6; 77-1861 Pet. 8) that the district court in both trials erred in limiting their cross-examination of a "key government witness," during which, they claim, they "sought to establish motive or animus."

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[3] Since the searches in these cases were of the trunks of automobiles stopped on the highway, no warrant was required. See *United States* v. *Chadwick, supra*, 433 U.S. at 12-13.

Neither petitioner specifies the witness or the incident in question. If they are referring to petitioner Rankin's attempt to determine whether Agent Reed was familiar with the legal standards concerning border stops and searches at the time he stopped Rankin (R. Tr. 51-55), the district court properly prohibited the questions.[4] As the court of appeals stated (77-1860 Pet. App. 14), "the agent's knowledge of the appropriate legal standards is not relevant to the constitutionality of the stop."

3. Petitioners claim (77-1860 Pet. 8; 77-1861 Pet. 8) that the district court, which ~~concluded~~ conducted the voir dire on the basis of written questions submitted to it by counsel, erred because it refused to allow defense counsel to ask questions directly to prospective jurors. Petitioner's contention is without substance. Rule 24(a) of the Federal Rules of Criminal Procedure explicitly provides that the trial judge may conduct the voir dire examination personally. See also *United States* v. *Grismore*, 546 F.2d 844 (10th Cir. 1976); *United States* v. *Wertis*, 505 F.2d 683 (5th Cir. 1974), cert. denied, 422 U.S. 1045 (1975); *United States* v. *Erickson*, 472 F.2d 505 (9th Cir. 1973).[5]

[4] Our review of the transcript of petitioner Ogden's trial discloses no similar attempt.

[5] Petitioner Rankin also states (Pet. 3-4), without arguing, that the trial court refused to ask the jurors any of the questions requested by defense counsel. Petitioner fails to specify the questions the court allegedly refused to ask, nor did he have the transcript of the jury selection procedure transcribed. In these circumstances, it is impossible to evaluate petitioner's claim. See Rules 19(b) and 23(1)(h), (3) and (4) of the Rules of this Court. In any event, petitioner failed to raise this issue in the court of appeals, and it is well settled that this Court will not review questions not raised in the court below. *United States* v. *Lovasco*, 431 U.S. 738, 788, n.7 (1977).

4. Petitioner Rankin alleges (Pet. 6-7) that the district court erred in allowing DEA Agent Eakes to testify that Ogden had told Eakes that Ogden was paying Rankin $1,000 to transport the marijuana to Oklahoma. But Eakes never gave any such testimony. Rather, he testified only (R. Tr. 155) that Rankin stated to him that he was being paid $1,000 by Ogden to drive the car to Oklahoma. Therefore, since only petitioner's own admission was received into evidence, this case presents no question under *Bruton* v. *United States*, 391 U.S. 123 (1968).

5. Petitioner Ogden contends (Pet. 6-7) that his confession was involuntary and should not have been admitted because the agents allegedly inflicted "injury and pain" on him for a minimum of 45 minutes and extorted his confession by threatening him with a charge of assault on a federal officer (Pet. 6). Petitioner's claim is refuted by the record.

Testimony adduced at the hearing conducted to determine the voluntariness of Ogden's confession (O. Tr. 64-104)[6] established that during the struggle to obtain Ogden's keys, Agent Jacobs placed a pair of handcuffs on him (O. Tr. 82). Immediately after the agents discovered marijuana in the trunk of

[6] This hearing was conducted during the trial and outside the presence of the jury.

his car, Ogden was given *Miranda* warnings, which he stated that he understood. Agent Jacobs testified (O. Tr. 84-85, 89) that when he handcuffed Ogden, he made sure that there were air spaces between the handcuffs and Ogden's wrists to provide circulation. Jacobs further testified (O. Tr. 84-85) that Ogden was "hollering the entire time" but that he and Agent Reed ignored him after ascertaining that the handcuffs could not be hurting him. Thereafter, when Ogden insisted that the handcuffs were too tight, Reed loosened them (O. Tr. 75-96).[7]

When DEA Agent Dracoulis arrived to transport Ogden to Corpus Christi, he placed a set of his own handcuffs on Ogden, advised him that he was under arrest for possession of marijuana with intent to distribute, and gave him further *Miranda* warnings (O. Tr. 66-67). Dracoulis testified (O. Tr. 72) that Ogden did not appear to be in any discomfort. Indeed, Ogden himself testified (O. Tr. 97-98) that the handcuffs placed on him by Dracoulis were not tight, that Dracoulis treated him civilly, and that it never crossed his mind that if he did not make a statement Dracoulis would tighten the handcuffs. Petitioner again confessed to DEA Agent Eakes upon his arrival in Corpus Christi. At the time petitioner made this statement, he was not handcuffed and was in no visible physical discomfort (O. Tr. 100-102).

[7] Indeed, the only person who suffered any pain as a result of the struggle was Agent Jacobs, who scraped his hands in placing the handcuffs on petitioner (O. Tr. 74).

On the basis of this evidence the district court correctly ruled (O. Tr. 105) that Ogden's confessions were voluntarily made and therefore admissible. There is no reason for this Court to review this essentially factual determination. See *Berenyi* v. *District Director*, 385 U.S. 630, 635-636 (1967).[8]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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[8] Petitioner Ogden's allegation (Pet. 6) that his confession was extorted by threats of filing assault charges against him is spurious. Testimony concerning this allegation (O. Tr. 83) showed that no such threats were made and that the charge of aggravated assault brought against petitioner on Agent Reed's behalf was filed after petitioner had made his confessions.

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